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No. 82-963.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

OSBORNE SHEPPARD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Respondent's Brief in Opposition.

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COMMONWEALTH OF MASSACHUSETTS,
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v.

OSBORNE SHEPPARD,
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On Writ of Certiorari to the
Supreme Judicial Court for the
Commonwealth of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether the Supreme Judicial Court of Massachusetts erred in refusing to recognize a good faith exception to the exclusionary rule where there was no

reasonable basis in fact for the asserted "good faith" belief on the part of the police officers who conducted the search that the warrant on which they relied was valid.

STATEMENT OF FACTS

The facts concerning the investigation which led to the application for a warrant in this case are set out in the opinion of the Massachusetts Supreme Judicial Court. Commonwealth v. Sheppard, 387 Mass. 488, 489-495 (1982)(Cert. Pet., Appendix A, pp. 3-18). Only the facts pertaining to the application for a search warrant and its issuance are stated here.

On Sunday May 6, 1979, as a result of his investigation into the death of Sandra Boulware, Detective Peter O'Malley of the Boston Police Department, prepared an

affidavit in support of an application for warrants to arrest the respondent, Osborne Sheppard, and to search his home at 42 Deckard Street in Roxbury for certain evidence, including a bottle of liquor, a woman's jacket and any of the victim's possessions that might be found there.[1] The affidavit was reviewed by the District Attorney for Suffolk County and his first assistant. Because it was a Sunday and the courts were closed, O'Malley was unable to locate a suitable form for the

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[1]The affidavit listed the following property to be seized: "A fifth bottle of amaretto liquor, 2 nickel bags of marijuana, a woman's jacket that has been described as black-grey (charcoal), any possession of Sandra D. Boulware, similar type wire and rope that match those on the body of Sandra D. Boulware or in the above Thunderbird. A blunt instrument that might have been used on the victim, men's or women's clothing that may have blood, gasoline burns on them. Items that may have fingerprints of the victim."

search warrant, but he did find a printed form from the Dorchester Municipal Court which was once used for drug searches.[2] The trial court specifically found that O'Malley knew the form was inappropriate for this case. He crossed out the words "controlled substances" on the cover of the form, but he left unchanged the body of the form which, when signed, would constitute the search warrant.

Accompanied by several other police officers and the first assistant district attorney, O'Malley went tothe home of a judge of the Roxbury Municipal Court to present the application for the warrants. After the Judge had reviewed the affidavit

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[2]The warrant prepared by the police and the district attorney's office and presented to the magistrate for his signature was on a form used under a narcotics statute which had been repealed in 1971. See Mass. Gen. Laws c. 94, Sec. 213, repealed by Mass. St. 1971, c. 1071.

and had questioned O'Malley about its substance, there was some discussion about the form. The judge acknowledged that the form was not appropriate. He searched his library for the proper form, but was unable to find one. He then told the police and the assistant district attorney that he would revise the form which they had brought with them. The judge took the form from Detective O'Malley and, in his presence, made some changes in the form and then signed it.[3]

In fact, the judge made no substantive changes in the form, which authorized the police "to search for any controlled substance, article, implement

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[3]Detective O'Malley testified that he "observed [the judge] crossing out and writing in words on papers himself." Thus, he must have known that the judge did not make any significant changes in the form.

or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance."[4] The signed warrant made no reference to the items specified in Detective O'Malley's affidavit, and the affidavit was not attached to the warrant. The warrant was then delivered to O'Malley for execution.[5]

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[4]The judge made only two alterations in the form, changing the caption as to the issuing court, from Dorchester to Roxbury, and the name of the issuing magistrate.

[5]The trial judge found that at this point the judge "informed Detective O'Malley that the warrant as delivered over was sufficient authority in form and content to carry out the search requested," (Pet. for Cert., App. B, p. 22), and this finding was apparently relied upon by the Supreme Judicial Court in concluding that the police reasonably believed the warrant was adequate. See Commonwealth v. Sheppard, supra, 387 Mass. at 502. Detective O'Malley testified that the judge told him "he would adjust the warrant." (Transcript of hearing, September 15, 1980, p. 47). There was no further testimony about the judge's standards.

Over two hours later, O'Malley and several other police officers went to the defendant's home at 42 Deckard Street. The detective spoke with the defendant's mother and sister, showed them the warrant and entered the house.[6] In the course of the search, the police discovered and seized, among other things, two earrings, some wire and a number of items which appeared to be bloodstained. Each of these items was introduced in evidence at the defendant's trial.

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[6]The trial court made the following finding: "O'Malley orally informed them that he had a warrant...There was no evidence that either occupant asked to see it or that it was read spontaneously to them." (Pet. for Cert., App. B, pp. 23-24.) O'Mally testified, however, that "...we spoke to the defendant's mother and sister and I showed them the warrant." (Transcript of hearing, September 15, 1980, p. 49.)

REASONS FOR DENYING THE WRIT

1. THE SEARCH IN THIS CASE WAS CONDUCTED UNDER A WARRANT WHICH WAS CLEARLY INVALID UNDER THE PRIOR DECISIONS OF THIS COURT.

It is undisputed that the warrant in this case failed to satisfy the minimum requirements of the Fourth Amendment and was clearly invalid under the prior decisions of this court. The Fourth Amendment embodies not only a substantive right, it also contains a procedure for enforcing that right. It guarantees the right to be free from "unreasonable searches and seizures", and it provides the means of protecting against such searches and seizures, the requirement of a warrant, issued by a neutral magistrate, upon a showing of probable cause. It also limits the authority to issue warrants to those "particularly describing the... persons or things to be seized." The

rationale for this requirement was stated in Marron v. United States, 275 U.S. 192, 196 (1927):

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

See Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979); Stanford v. Texas, 379 U.S. 476 (1965); Marcus v. Search Warrants, 367 U.S. 717 (1961).

Here, the warrant authorizing the search of the defendant's home did nothing to limit "the discretion of the officers executing the warrant." It not only failed to describe with "particularity" the things which were to be seized, it failed to describe them at all. The

warrant signed by the magistrate generally authorized the seizure of drugs and drug paraphernalia. It did not mention the bottle of liquor, the woman's jacket, the wire, the victim's possessions or any of the other items described in the affidavit. It did not incorporate or otherwise refer to the affidavit, and the affidavit was not attached to the warrant.

The judge who heard, and denied, the motion to suppress the evidence seized by the police found that the warrant was "so inappropriate as to be plainly unconstitutional" and observed that he had "never seen anything so plainly on its face a nullity. "The Massachusetts Supreme Judicial Court agreed. It concluded that the the warrant was defective in that it "failed to describe the items sought to be seized" and

therefore "violated the requirements of the Fourth Amendment to the United States Constitution, art. 14 of the Declaration of Rights and G.L. c. 272, sec. 2." Commonwealth v. Sheppard, supra, 387 Mass. at 499-500. 501.[7]

The Commonwealth of Massachusetts does not challenge the correctness of this conclusion. Rather, it suggests that the Fourth Amendment violations were merely "technical" and, accordingly, that the

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[7] Particularity in the description of the things to be seized is required under Article 14 of the Declaration of Rights ("special designation of the persons or objects of search, arrest, or seizure"), and the Massachusetts statute governing the issuance of search warrants, Mass. Gen. Laws, c. 272, Sec. 2 ("Search warrants shall designate the building...to be searched and shall particularly describe the property or articles to be searched for.").

police officers were acting in "reasonable good faith." It contends that the Supreme Judicial Court should have recognized a reasonable good faith exception to the exclusionary rule and should have found that the evidence obtained in the course of the unlawful search of the defendant's home was admissible.

2. THE SEARCH CONDUCTED BY THE POLICE WAS NEITHER REASONABLE NOR CONDUCTED IN "GOOD FAITH".

This is not an appropriate case for carving out a "good faith" exception to the exclusionary rule. If applicable to the facts of this case, the proposed exception would swallow the rule. The violation of the Fourth Amendment in this case --the conduct of a search which was not authorized by the warrant-- was anything but "technical," and the actions

of the police, in failing to heed the contents of the warrant, were anything but reasonable.

Many of the judges and commentators who have considered the adoption of such an exception have concluded that it should be invoked only upon a showing that the officer's belief in the lawfulness of the search was objectively reasonable.[8] Massachusetts concedes in its Petition for Certiorari that this is the proper

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[8] See, e.g., Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. Crim. L. & Criminology 635; Williams v. United States, 622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied 449 U.S. 1127 (1981); Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting).

standard.[9] Here, however, the conduct of the officials conducting the search fails any objective test of reasonableness. As Justice Liacos noted in his concurring opinion in the Supreme Judicial Court:

> To take the position that these law enforcement personnel acted in "good faith" is simply to say that no showing of evil intent has been proved. It cannot be said, however, that the officers acted reasonably...

Commonwealth v. Sheppard, supra, 387 Mass. at 513.

The detective who was reponsible for the preparation of the warrant application was an experienced officer with nineteen years on the police

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[9] Petition for Certiorari, p. 18 (citing Justice White's formulation of the proposed exception to the exclusionary rule in his dissenting opinion in Stone v. Powell, supra, as having "particular applicability to the circumstances of this case").

force.[10] The application for the warrant was prepared with the assistance of the District Attorney and the First Assistant District Attorney, who also accompanied the police to the magistrate's home to present the application for the warrant. Both the detective and the prosecutor knew that the warrant form which they had prepared for the magistrate to sign was not the proper form. They discussed this fact with the magistrate before the warrant was signed. They were present when the magistrate made some perfunctory changes in the form in an attempt to adapt it to the needs of the case. After the warrant had been modified

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[10] Detective O'Malley was particularly experienced in the investigations of homicides and knowledgeable about the procedure for obtaining a search warrant.

and signed by the magistrate, it was returned to them for execution and they had ample opportunity to review it.

The record does not specifically disclose whether the police officers or the assistant district attorney who accompanied them to the judge's house ever read the warrant after it had been slightly modified and signed by the judge. It suggests that they did not. If they had read the warrant, they would have known--and they certainly should ahave known--that it was insufficient. The warrant remained a warrant authorizing the seizure of drugs and drug paraphernalia. The judge had made no substantive changes, leaving it in precisely the form which they knew to be deficient. The facial deficiency of the warrant was still obvious. Given the considerable

experience of the police officers and the participation of senior members of the district attorney's office in the application for the warrant, they also should have known that this deficiency would render the warrant, and any search conducted under its authority, invalid.

If the police failed to read th warrant after it had been modified and signed by the judge, there is even less reason to conclude that their behavior was reasonable. Under these circumstances, a reasonably prudent person would have read the warrant--and read it very carefully--taking special care to see that it was in the proper form.

> ...because everyone knew that they were dealing with an improper "form" warrant that had to be adapted to fit their purposes, extra care should have been taken to ensure that the warrant read properly.

Commonwealth v. Sheppard, supra, 387 Mass. at 512 n. 6 (Liacos, J., concurring).

In either case, whether they read the warrant and disregarded its plain language or simply failed to read it at all, there is no basis for the assertion that the police acted reasonably and in good faith. A search warrant is not a mere formality. It is central to the protection provided by the Fourth Amendment. If the police are not required to read the warrant, or may disregard its contents, then the warrant requirment will be meaningless, and the Fourth Amendment a hollow promise.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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